**ER ENG HONG & ANOR**

**v.**

**NEW KIM ENG DAN TIAP-TIAP PEMEGANG YANG MENDUDUKI ATAS SEBAHAGIAN TANAH YANG DIKENALI SEBAGAI HS (M) 2162 PTD 4403 MUKIM BENUT, DAERAH PONTIAN**

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-2013-1998]
23 JULY 1999

***CIVIL PROCEDURE:*** *Action - Summary proceedings for possession of land - When may an application under O. 89 r. 1 Rules of the High Court 1980 be made - Occupation pursuant to alleged employer-employee relationship between previous land owner and occupant's father - Whether such relationship prevents institution of O. 89 proceedings - Whether such relationship gives occupant consent or licence to occupy land - Whether payments for supply of electricity and water confer rights on occupant*

***EQUITY:*** *Property, equitable interest in - Proof of - Summary proceedings for possession of land - What must be shown by occupants to claim equitable interest in land to resist O. 89 Rules of the High Court 1980 proceedings*

***CIVIL PROCEDURE:*** *Execution - Stay - Summary proceedings for possession of land decided in land owner's favour - Whether house in which unlawful occupants resided should not be demolished pending appeal - Whether to allow stay is to go against intent of O. 89 Rules of the High Court 1980*

***CIVIL PROCEDURE:*** *Execution - Stay - Application made when only notice of motion for leave to appeal filed - Whether may be said that there is a pending appeal - Rules of the Court of Appeal 1994, r. 5(1)*

***LAND LAW:*** *Trespass - Unlawful occupation - Self-help remedy open to proprietor of land - Whether curtailed by amended s. 7(2) Specific Relief Act 1950 (Act 137) - Whether remedy no longer available*

The plaintiffs applied pursuant to O. 89 r. 1 of the Rules of the High Court 1980 ('the RHC') for summary possession of a piece of land ('the land'). The plaintiffs, in their affidavit supporting the application, deposed, *inter alia,* (i) that they were the registered proprietors of the said land having purchased the same sometime in 1993; (ii) that there was a wooden house built on part of the land without their permission or consent wherein the defendants lived; (iii) that they had directed the defendants to vacate the house on several occasions

but the defendants failed to do so; and (iv) that their solicitors had given written notice to the defendants to surrender vacant possession. In the defendants' affidavit in reply affirmed by New Kim Eng, he deposed, *inter alia*, (i) that his father had built the said house on the land some 40 years ago with the permission and consent of the previous land owner; (ii) that there was an employer and employee arrangement between his father and the previous land owner since his father managed and tapped rubber trees planted on the land with the profits derived therefrom being shared equally between his father and the previous land owner; (iii) that he had no knowledge that the plaintiffs had bought the land; (iv) that the plaintiffs had bought the land with full knowledge of his occupation of the land and the house erected thereon thereby resulting in him having an equitable interest in the land; and (v) that the water supply to the premises was registered in his father's name while the electricity supply was registered in his name and as proof of this, copies of these bills were exhibited. There were two water bills dated sometime in 1974 in the name of one Neo Chin Tong. In response, the plaintiffs denied that they had knowledge that the previous land owner had given permission to the defendants to occupy a part of the land and they further denied that the defendants had any right whatsoever to the land.

As the court went on to decide this application in favour of the plaintiffs, the defendants applied for a stay of execution pending their appeal. The defendants had filed a notice of motion at the Court of Appeal when they applied for a stay of execution. Their grounds for so applying was that the wooden house should not be demolished so as to give effect to the decision of the Court of Appeal in the event the appeal was allowed and that the plaintiffs would not be prejudiced as any prejudice, if suffered, can easily be compensated by costs.

**Held:**

**[1]** Order 89 r. 1 of the RHC applies to the claim of possession of land which is occupied solely by a person or persons who entered into or remained in occupation without licence or consent. Strictly speaking, this rule applies only to illegal squatters. If the occupation of the land is with the continuing consent of the registered proprietor, whether implied or expressed, then O. 89 of the RHC would not be the applicable procedure.

**[2]** There was nothing to show whether there was a contract of service entered between New Kim Eng's father and the previous owner of the land. Under s. 10 of the Employment Act 1955, a contract of service for a period exceeding one month shall be in writing. This means the contract of service between New Kim Eng's father and the previous land owner shall be in writing. Therefore, in the absence of that contract of service this court cannot presume that there was an employer and employee relationship between Kim Eng's father and the previous land owner.

**[3]** Order 89 r. 1 of the RHC does not provide for an employer-employee situation and thus this is entirely outside its scope. No where does it say that proceedings should not be commenced under this order for the recovery of property occupied by an employee under a contract of service with the employer.

**[4]** The court cannot infer from the available evidence that the defendants had either consent or a licence to occupy the land. The employer and employee relationship alluded to by the defendants cannot give rise to an inference that there was either consent or a licence to occupy the land. Payments of electricity and water bills do not give any right to the defendants to own the land. The land is now owned by the plaintiffs and under the law, the wooden house too becomes part and parcel of the land and the ownership thereof rests entirely with the plaintiffs.

**[5]** In order for equity to intervene, the defendants must show evidence of some inducement or encouragement by the plaintiffs or some expectation held out by them to the defendants on the strength of which the defendants had expended money on the land. In the instant case, there was nothing to support the application of any equitable doctrine in favour of the defendants.

**[6]** Rule 5(1) of the Rules of the Court of Appeal 1994 states that appeals to the court shall be by way of re-hearing and shall be brought by giving notice of appeal. The defendants here had only filed a notice of motion at the Court of Appeal for leave to appeal.

**[7]** The application for stay should be refused considering that (i) the fact that the appeal may be successful in the Court of Appeal cannot constitute successful circumstances nor can the nugatory approach be adopted in favour of the defendants since the substantive appeal had no merit and is doomed to fail *in limine*; (ii) successful litigants are entitled to enjoy the fruits of their litigation; (iii) effect must be given to O. 89 of the RHC, a procedure formulated by the Rules Committee to provide expeditious despatch of business in the courts; and (iv) if the stay was granted for the reasons advanced by the defendants, then the purpose of the Rules Committee in formulating O. 89 of the RHC would be defeated because the same arguments would repeatedly be used to apply for a stay in O. 89 applications.

***Per curiam:***

**[1]** The amended s. 7(2) of the Specific Relief Act 1950 (Act 137), which came into force on 31 January 1992, would relegate the remedy of self help into oblivion as the owner of the property can only seek to enforce his right to recover his property from the occupier by way of a court action.

*[Application allowed.]*

**Case(s) referred to:**

*Bohari Taib & Ors v. Pengarah Tanah Galian Selangor [1991] 1 CLJ 647* ***(refd)***

*Bristol Corp v. Ross & Anor [1973] 3 All ER 393* ***(refd)***

*Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Menduduki Rumah Yang Ditanda Sebagai "A3" Dan Didirikan Atas Sebahagian Tanah Yang Dipegang Di Bawah Hakmilik CT2733 Lot 2103, Mukim Plentong, Daerah Johor Bahru, Negeri Johor [1999] 1 CLJ 575* ***(refd)***

*Chang Siew & Ors v. Chang Sang & Anor [1993] 1 CLJ 125* ***(refd)***

*Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 3 MLJ 40* ***(refd)***

*Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127* ***(refd)***

*Chiu Wing Wa & Ors v. Ong Beng Cheng [1994] 1 CLJ 313* ***(refd)***

*Hitchcock v. Post Office [1980] ICR 100* ***(refd)***

*Hosna Realty Sdn Bhd v. Nor Azhar Zainol & Ors [1994] 4 CLJ 541* ***(refd)***

*Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 86* ***(refd)***

*Lim Hock Kim v. Sim Seng Quee [1982] 2 MLJ 210* ***(refd)***

*Majlis Amanah Rakyat (MARA) v. Tan Seek Hong & Ors [1994] 3 CLJ 64* ***(refd)***

*Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd [1947] AC 1* ***(refd)***

*Morren v. S Winton & Pendlebury Borough Council [1965] 1 WLR 576* ***(refd)***

*Ooi Ah Seng v. Chan Lin Lam [1973] 2 MLJ 20* ***(refd)***

*Ooi Ho Cheng v. Grace Joseph & Ors [1975] 1 MLJ 168* ***(refd)***

*Performing Right Society Ltd v. Mitchell & Booker (Palais de Danse) Ltd [1924] 1 KB 762* ***(refd)***

*Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors [1989] 2 CLJ 967* ***(refd)***

*Punca Klasik Sdn Bhd (No 2) [1995] 4 BLJ 337* ***(refd)***

*Ready-Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2 QB 497* ***(refd)***

*Salim Ismail & Ors v. Lebbey Sdn Bhd (No 1) [1997] 1 CLJ 98* ***(dist)***

*Salim Ismail & Ors v. Lebbey Sdn Bhd (No 2) [1997] 1 CLJ 102* ***(refd)***

*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299* ***(refd)***

*Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor & Other Cases [1996] 2 CLJ 965* ***(refd)***

*Sidek Hj Mohamad & Ors v. The Government of the State of Perak & Ors [1982] 1 CLJ 244* ***(refd)***
*Simmons v. Heath Laundry [1910] 1 KB 543* ***(refd)***
*Whittaker v. Minister of Pensions and National Insurance [1967] 1 QB 156* ***(refd)***
*Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353* ***(refd)***
*Yap Hong Thin v. Seenevasam [1970] 1 MLJ 143* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 73
Employment Act 1955, ss. 2(1), 10, 11
Rules of the Court of Appeal 1994, r. 5(1)
Rules of the High Court 1980, O. 89 r. 1
Specific Relief Act 1950, s. 7(2)

*For the plaintiffs - Ang Boon Heng; M/s HH Long & Co*
*For the defendants - K Sila Dass; M/s K Sila Dass & Partners*

*Reported by S Dharmendran*

## JUDGMENT

**Abdul Malik Ishak J:**

***The Facts***

This was an application by both the plaintiffs in encl. 3 for summary possession of a piece of land held under HS (M) 2162 PTD 4403 Mukim Benut, daerah Pontian measuring 2.522 acres (hereinafter referred to as the "land") under O. 89 r. 1 of the Rules of the High Court 1980 ("RHC").

In its translated form, the prayers sought for in encl. 3 were worded in this way:

(1) The plaintiffs to obtain vacant possession of the land on the grounds that the plaintiffs were entitled to obtain vacant possession and those occupiers who occupied the land did so without permission or consent.

(2) The defendants and all those who stayed on a portion of the land were required to give vacant possession to the plaintiffs and to vacate the house built thereon within 14 days from the date of the order herein obtained.

(3) The costs of the application and the related costs therein to be borne by the defendants.

Enclosure 3 was dated 28 November 1998 and it was filed on 30 November 1998.

Enclosure 3 was supported by the joint affidavit of both the plaintiffs as seen in encl. 2 that was affirmed on 15 October 1998 and filed on 20 October 1998. In encl. 2, both the plaintiffs deposed that what they stated were within their knowledge and that they were true. They also deposed that they affirmed the affidavit in encl. 2 to support their application in encl. 3. They deposed that they are currently the registered proprietors of the land and that they had bought the land sometime in the year 1993, to be precise on 5 July 1993 as seen in the photostat document of title exhibited and marked as "EEH 1". They deposed that after they had purchased the land, they discovered that there was a wooden house being built on the land without their permission or consent. Two photographs of the wooden house – both these two photographs were photostated copies, were exhibited and marked as exh. "EEH 2" in encl. 2 and a perusal of these two photographs clearly showed in the foreground a dilapidated wooden single storey bungalow house while at the background was a double storey bungalow house which was built and owned by both the plaintiffs. Both the plaintiffs deposed that they had on several occasions directed the defendants to surrender vacant possession of a part of the land wherein the wooden single storey bungalow house stood but the defendants failed, refused and simply ignored those directions. The plaintiffs had no choice and they directed their solicitors Messrs H.H. Long & Co to send a letter to the defendants and the other occupiers who were on the land to surrender vacant possession. The defendants responded through their solicitors Messrs K. Sila Dass & Partners who conveyed the message that the defendants ought not to be disturbed. The letter from Messrs K. Sila Dass & Partners dated 12 January 1998 addressed to the plaintiffs was worded thus (exh. "EEH 3" of encl. 2):

K. SILA DASS & PARTNERS

12-1-1998

MR/D/3001/98/MISC./YU

**A.R. REGISTERED**

**CERTIFICATE OF POSTING**

ER ENG HONG,
KAMPONG PARIT ISMAIL,
BENUT, PONTIAN,
JOHOR.

Dear Sir,

We are the solicitors for Mr. NEW KIM ENG & NEO KIM ENG of 77A, Jalan Parit Ismail, Benut, Johore, who instructs us that you came to our client's house on 21-12-1997 at about 8.00 pm with a group of men.

You also said that there was a solicitor with you and demanded that our client sign a letter prepared in Chinese language to the effect that our client shall quit and deliver vacant possession of a house known as No. 115, Jalan Parit Ismail, Benut.

According to our client he is not the owner of the aforesaid premises.

Our client has also lodged a Police report in regard to this matter.

Please take notice that you are to forthwith refrain from harassing our client. If you continue to harass our client please note that such action as may be necessary will be taken against you.

Yours faithfully,

Sgd.

c.c. Client.

and in clear terms the defendants did not want to be harassed by the plaintiffs. Whereas the letter from Messrs H.H. Long dated 17 April 1998 addressed to the defendants and all the other occupiers was worded in this fashion (exh. "EEH 3" of encl. 2):

H.H. LONG & Co.

HHL/ABH/jk/10046/98

A.R. REGISTERED
CERTIFICATE OF POSTING

17th April, 1998

**New Kim Eng @ Neo Kim Eng**
and all occupiers thereat
115, Jalan Parit Ismail
82200 Benut
Pontian, Johor.

Dear Sirs,

**TRESPASS ONTO ALL THAT PIECE OF LAND HELD UNDER HS (M) 2162 PTD 4403, MUKIM BENUT**

We act for Er Eng Hong and Goo Lay Moi, the registered proprietors of all that piece of land held under HS (M) 2162 PTD 4403, Mukim Benut, District of Pontian.

We are instructed by our clients that you are occupying a wooden house known as 115, Jalan Parit Ismail, Benut, Pontian built on part of our clients' said land without our clients' consent and permission.

We are also instructed by our clients that notwithstanding our clients' demands and requests, you have still failed, refused and/or neglected to (vacate) the said wooden house. Furthermore, we are instructed that *vide* a letter dated 21-2-97, you have agreed to (vacate) the said wooden house and deliver vacant possession thereof to our clients on or before 31-3-98, whereby you have again failed to do so.

We are now instructed to, which we hereby do, demand that you do within fourteen (14) days from date hereof, (vacate) the said wooden house and deliver vacant possession thereof (to) our clients.

We are also instructed to, which we hereby do, give you notice that your action tantamount to trespassing onto our clients' property, and you shall be liable to our clients for damages.

**TAKE NOTICE** that if you fail, refuse and/or neglect to (vacate) the said wooden house and deliver vacant possession thereof to our clients fourteen (14) days from date hereof, wothout prejudice to our clients' right of action against you for damages, we have (to institute) legal (proceedings) against you.

Your faithfully,

c.c – Clients.

The plaintiffs categorically deposed in encl. 2 that they had obtained the permission of the Pontian district council on 9 May 1997 to build a double storey bungalow house on the land. The approval of the Pontian district council was exhibited and marked as exh. "EEH 4" in encl. 2. The plaintiffs deposed that the single storey wooden bungalow house that was occupied by the defendants and the other occupiers therein was located in front of the plaintiffs' double storey bungalow house and, consequently, it obstructed the access road towards the plaintiffs' double storey bungalow house and to alleviate this nagging problem, the plaintiffs required vacant possession of that part of the land. It was the plaintiffs stand and the plaintiffs so deposed that the defendants and the other occupiers were trespassers and the plaintiffs' solicitors emphasised this point by letter addressed to the defendants' solicitors. That letter was dated 2 May 1998 and it was worded thus (as seen in an exh. marked "EEH 5" of encl. 2):

**H.H. LONG & CO.**

URGENT

HHL/ABH/jk/10046/98C

2nd May, 1998

**M/S. K. SILA DASS & PARTNERS**
Advocates & Solicitors
156, Jalan Meriam
84000 Muar
Johor.

Dear Sirs,

**TRESPASS ONTO ALL THAT PIECE OF LAND HELD UNDER HS (M) 2162 PTD 4403, MUKIM BENUT**

We refer to your letter dated 23-4-98 of which we have obtained (instructions) from our client.

Our (instructions are) that your client is occupying part of our client's land without consent and permission and as such a trespasser per se. Your client's alleged occupation of the land for more than 40 years would not be in any event (give) any right to your client to occupy the land.

Further, our client denies paragraph 4 of your letter under reference. In the circumstances, we are instructed to commence (proceedings) against your client, kindly let us know whether you have (instructions) to accept service of process.

Yours faithfully,

c.c. – Client.

The plaintiffs finally deposed that they required the portion of the land as alluded to earlier and they prayed for orders as per encl. 3 thereof.

The defendants took exception to encl. 2 and they responded by filing an affidavit in reply in encl. 5 that was affirmed on 2 December 1998 and filed the next day. New Kim Eng @ Neo Kim Eng ("Kim Eng") affirmed the affidavit in reply in encl. 5 and there he deposed that he was the person named in encl. 3 and whatever he deposed to was done within his knowledge and belief. Kim Eng deposed that his father had built the single storey wooden bungalow house on the land approximately 40 years ago and they had stayed there with the permission and consent of the previous land owner. Kim Eng deposed that his father had managed and tapped the rubber trees that were planted on the land and all the profits were shared equally between his father and the previous owner of the land. The water supply to the premises was

registered in the name of his father while the electricity supply was registered in Kim Eng's name. The photostat copies of the water and electricity bills were exhibited and marked as exh. "NKE-1", collectively. There were two water bills: one bearing serial no: D 392505 dated 15 April 1974 in the name of Neo Chong Tin, Lot 445 Kg. Pt. Ismail, Benut, Pontian and the other serial no: E 317978 dated 21 December 1974 in the name of Neo Chong Tin, Lot 445 Kg. Pt. Ismail, Benut, Pontian. Who was the personality by the name of Neo Chong Tin was not explained at all by Kim Eng. Lot 445 was not related to the land in question. The subject land bears Lot No. PTD 4403, HS (M) 2162 and that being the case, the two water bills were of no assistance, at all, to the defendants. Incidentally, both the water bills were issued in 1974 and this meant that it was not true that the defendants had occupied part of the land for the last 40 years. Kim Eng averred that he had no knowledge that the plaintiffs had bought the land in 1993 and he contended in encl. 5 that if the plaintiffs had bought the land, of which he denied having knowledge of it, the plaintiffs did so with the full knowledge of his occupation of the land and the house erected thereon and for this reason he contended that he had an equitable interest thereon. He denied the allegation that he was a trespasser and he said that it was not true that he was a trespasser. He was advised by his solicitors and he verily believed that he was in lawful occupation of the land with the permission of the then proprietor of the land. He reiterated that he was not a trespasser and he contended that the plaintiffs' claims were misconceived and it should be dismissed with costs. He too was advised and he verily believed that this was not a matter that can be disposed off under O. 89 of the RHC.

The plaintiffs quickly responded and they filed an affidavit in reply on 16 December 1998 which was affirmed on the same day as seen in encl. 6. In that affidavit in reply, the plaintiffs deposed that what they averred were within their knowledge and they were the truth and the plaintiffs categorically stated that they wanted to reply to encl. 5. The plaintiffs deposed that they had no knowledge that the previous owner of the land had given permission to the defendants to occupy a part of the land. They were advised and they verily believed that the facts as disclosed did not give nor vest the defendants with any right whatsoever to the land. They too were advised and they verily believed that the payments of the water and electricity bills could not and did not vest the defendants with ownership of the land in question. The plaintiffs denied that the defendants had equitable interests on the land. For these reasons, the plaintiffs sought for those prayers in encl. 3.

***The Law***

Order 89, r. 1 of the RHC states as follows:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

and it is designed to oust illegal occupiers expeditiously without resort to a writ action (*Yap Hong Thin v. Seenevasam* [1970] 1 MLJ 143). Mohd Noor J in *Hosna Realty Sdn Bhd v. Nor Azhar bin Zainol & Ors* [1994] 4 CLJ 541 at 545 aptly said:

> This order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. Its machinery is designed to overcome the apparent shortcomings of procedural law. It is intended to remedy an exceptional mischief of a totally different character from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under Order 14.

The rule will not apply to a tenant or to a tenant holding over after the termination of the tenancy (*Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ 457; *Chang Siew & Ors v. Chang Sang & Anor* [1993] 1 CLJ 125 at 126 and *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313; [1994] 1 MLJ 89). Thus, proceedings commenced under this order for the recovery of property occupied by tenants whose tenancies have come to an end will not be entertained by this court. The rule as drafted applies to the limited circumstances as illustrated in r. 1, in that, it applies to the claim of possession of land which is occupied solely by a person or persons who entered into or remained in occupation without licence or consent. Strictly speaking, this rule applies only to illegal squatters. But, if the occupation of the land is with the continuing consent, whether implied or expressed of the registered proprietors, then O. 89 would not be the proper procedure to apply: *Salim bin Ismail & Lain-Lain v. Lebbey Sdn Bhd (No: 2)* [1997] 1 CLJ 102; [1997] 2 MLJ 4.

Now, I have to differentiate between a person who has entered into possession of the land without a licence and one who has entered with a licence and is holding over after such licence has been terminated. A case in point would be that of *Bohari bin Taib & Ors v. Pengarah Tanah Galian Selangor* [1991] 1 CLJ 647; [1991] 1 MLJ 343 SC, a decision of the then Supreme Court of Malaysia. This was a case of summary procedure for the recovery of the

possession of state land whereas the present case involved an alienated land but the law as enunciated by Mohamed Azmi SCJ on the applicability of an O. 89 application are germane and should be reproduced here (see p. 346 of the report):

> In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code 1965. In this case, we also find that the respondent has failed to comply with r. 3(b) of O. 89 by its failure to disclose fully in its affidavit-in-support, the whole of the relevant circumstances how the lands came to be occupied by the appellants both before and after the three-year period of the TOL, and why the approval of the State Executive Council to the alienation of the lands to the farmers as contained in the collector's letter of 25 October 1980, was neither exhibited nor implemented.
>
> Finally, it has come to our knowledge that recently in *Mohd Rawi bin Yaacob v. Federal Land Development Authority* [1991] 1 MLJ *(refd)* another panel of this court (Abdul Hamid LP, Gunn Chit Tuan, and Jemuri Serjan SCJ), had in allowing an appeal held that where the entry to the land is lawful, and where there are triable issues, O. 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

*Mc Phail v. persons, names unknown, Bristol Corporation v. Ross and Another* [1973] 3 All ER 393 CA, was a case of squatters simpliciter. In that case, the defendants who were homeless broke into unoccupied premises owned by the plaintiffs and made their homes there. The defendants knew that they were squatters. Lord Denning M.R. in his usual style said at p. 395 to p. 396:

> What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law. As we said in *London Borough of Southwark v. Williams* [1971] 2 All ER 175 at 179, [1971] Ch 734 at 744:

> If homelessness were once admitted as a defence to trespass, no one's house could be safe ... So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good.

Lord Denning MR at p. 396 of the report, encouraged land owners to adopt the remedy of self help and this was what his Lordship said:

> Now I would say this at once about squatter. The owner is not obliged to go to the court to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. This is not a course to be recommended because of the disturbance which might follow. But the legality of it is beyond question. The squatters were themselves guilty of the offence of forcible entry contrary to the statute of 1381, The forcible Entry Act 1381 (5 Ric 2 Stat I C 7). When they broke in, they entered 'with strong hand' which the statute forbids. They were not only guilty of a criminal offence. They were guilty of a civil wrong. They were trespassers when they entered, and they continued to be trespassers so long as they remained there. The owner never acquiesced in their presence there. So the trespassers never gained possession. The owner, being entitled to possession, was entitled forcibly to turn them out: see *Browne v. Dawson* [1840] 12 Ad & El 624. As Sir Frederick Pollock put it in his book on *Torts Pollock's Law of Torts* (15th Edn, 1951), p. 292:
>
> > A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.
>
> Even though the owner himself should use force, then so long as he uses no more force than is reasonably necessary, he is not himself liable either criminally or civilly. He is not liable criminally (1) because it was said in the old times that none of the statutes of forcible entry apply to the expulsion by the owner of a tenant at will: see *Anon* [1670] 1 Vent 89; *R v. Dormy* [1700] I Ld Raym 610; *R v. Bathurst* [1755] Say 225; but, even if this is no longer true, (2) in any case the statutes only apply to the expulsion of one who is in possession: see *R v. Child* [1846] 2 Cox CC 102. They do not apply to the expulsion of a trespasser who has no possession. The owner was not civilly liable because the owner is entitled to turn out a trespasser using force, no more than is reasonably necessary: see *Hemmings v. Stoke Poges Golf Club* [1920] 1 KB 720, [1918-19] All ER Rep 798.

In Malaysia, the remedy of self help was alluded to by our courts in the following cases:

(1) *Sidek bin Haji Mohamad & Ors v. The Government of the State of Perak & Ors* [1982] 1 CLJ 244; [1982] 1 MLJ 313 FC;

(2) *Majlis Amanah Rakyat (MARA) v. Tan Seek Hong & Ors* [1994] 2 AMR 1296 at 1302;

(3) *Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 2 CLJ 967; [1989] 1 SCR 639; and

(4) *Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Menduduki Rumah Yang Ditanda Sebagai "A3" Dan Didirikan Atas Sebahagian Tanah Yang Dipegang Di Bawah Hakmilik CT 2733 Lot 2103, Mukim Plentong, Daerah Johor Bahru, Negeri Johor* [1999] 1 CLJ 575.

But a note of caution must be registered here. The amended s. 7(2) of the Specific Relief Act 1950 (Act 137) which came into force on 31 January 1992 by Act A 811 would relegate the remedy of self help into oblivion as the owner of the property can only seek to enforce his right to recover his property from the occupier by way of a court action. That s. 7(2) of the Specific Relief Act 1950 (Act 137) enacts as follows:

> When a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.

Gopal Sri Ram JCA in *Shaheen bt Abu Bakar v. Perbadanan Kemajuan Negeri Selangor & 2 Other Cases* [1996] 2 CLJ 965 CA, explained that the scope and application of O. 89 must be viewed in the context of the local flavour particularly looking at the circumstances that prevail in our country. This was what his Lordship said at p. 974 of the report:

> Now, O. 89 has its origins in the English RSC. O. 113 with which it is in *pari materia*. Cases decided in England and the comment upon the corresponding English rule of court are therefore of assistance when considering the scope and application of O. 89. But in the final analysis, courts in this country must bear in mind the peculiar circumstances that prevail here and should therefore apply the order to meet these circumstances.
>
> In my judgment, it would be quite wrong for our Courts to apply, without question or qualification, the views expressed by English Judges or commentators, however eminent, to cases that arise before them under parallel provision of written law without addressing the circumstances that prevail in this country. Especially is this so in cases involving the practice and procedure of our Courts, where the approach that we adopt may be at variance with that followed by Courts of England.

Of course, if a view of the law that we take on a particular subject is similar to that expressed in an English case, it would be quite proper to cite that decision as authority for the proposition stated. But there should be no slavish adherence to English precedent.

I have made these observations because we were during argument, referred by counsel to a commentary by the editors of the English Supreme Court Practice, 1991 on the English RSC O. 113 dealing with the scope of the order and the way in which it should be applied. The views expressed in the passages that were read by counsel are unsupported by any authority.

I certainly do not consider myself bound by these views and the course I propose to take is to make up my own mind about how O. 89 is to be applied, having regard to any judicial pronouncements of our Courts in cases where the order has come up for consideration. There may, consequently, be a difference in approach I take and that suggested by the editors of the Supreme Court Practice, but this is inevitable because of the circumstances that prevail in our jurisdiction.

In regard to the issue of standing, Gopal Sri Ram JCA had this to say in the *Shaheen's* case *(supra)*, particularly at p. 975 of the report:

In my judgment, the test of standing that is to be applied in cases under O. 89 is one based upon a right to possession. The question that has to be asked is whether, given the peculiar circumstances of the particular case, the plaintiff has a right to possession of the land. An affirmative answer may be provided to that question even in cases where the plaintiff is not the registered proprietor of the land, possession of which he is claiming.

At the other extreme, cases may arise where a negative response may be drawn to that very question, although the plaintiff is the registered proprietor of the land. Such a response may be due to the fact that the registered proprietor has parted wholly with his right to possession to some other person, in which event, it would be that other person who would have standing to commence proceedings. As I earlier said, it all depends on the facts of each case.

The court must in each case undertake a careful examination of the facts and determine in whom the right of possession resides. If it is with the particular plaintiff, then, he has standing. If it lies elsewhere, then there is no *locus standi*.

His Lordship Gopal Sri Ram JCA in the *Shaheen's* case placed high premium on the judgment of Mohamed Azmi SCJ in the case of *Bohari bin Taib & Ors v. Pengarah Tanah Galian Selangor (supra)*, and his Lordship then summarised *Bohari's* case in this way (see p. 977 of *Shaheen's* case):

It may be seen from the passage quoted above that there are two elements (which I shall for convenience refer to as 'the ouster elements') that oust the operation of O. 89. They are as follows:

(1) The initial entry upon the land must be lawful; and

(2) The existence of any express or implied consent or licence on the part of the owner pursuant to which the occupation continued.

In respect of the second element, all that need be shown to exclude O. 89 is that the issue of consent or licence is triable. Once triable issues in respect of element (2) are shown, the summary jurisdiction is ousted.

One other point of principle emerges from a reading of his Lordship's judgment in *Bohari's* case. It is the question whether the ouster elements exist in a given case depends upon its particular facts.

All these authorities serve as useful guidelines and at the end of the day the crucial question for me to pose would be whether I could, on the available evidence, infer either consent or a licence to occupy the land. I too have to consider whether the defendants were nothing more than mere squatters.

***Would O. 89 Of The RHC Be An Appropriate Procedure For The Plaintiffs To Rely Upon?***

Mr. Ang Boon Heng, learned counsel for the plaintiffs, argued that the defendants were squatters and should be ousted summarily under O. 89 of the RHC. Mr. K. Sila Dass, learned counsel for the defendants, held an opposite view and it was his submission that there was an employer and employee arrangement between Kim Eng's father and the previous land owner and that kind of arrangement would bring the case outside the purview of O. 89 r. 1 of the RHC. That kind of arrangement too, so submitted Mr. K. Sila Dass, would give rise to a triable issue which should be adjudicated in open court.

The details of that employer and employee relationship can be seen from the affidavit of Kim Eng in encl. 5. Kim Eng deposed that his father had built the wooden single storey bungalow house on the land some 40 years ago and they had stayed there with the concurrence of the previous owner of the land. The arrangement even extended to Kim Eng's father managing and tapping the rubber trees that were planted on the land with the profits derived therefrom being shared equally between Kim Eng's father and the previous land owner. The word "employer" is defined in s. 2(1) of the Employment Act 1955 (Act 265) as follows:

'employer' means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word 'employ', with its grammatical variations and cognate expressions, shall be construed accordingly;

while the word "employee" is defined in the same section of the same Act in this fashion:

'employee' means any person or class of persons –

(a) included in any category in the First Schedule to the extent specified therein; or

(b) in respect of whom the Minister makes an order under sub section (3) or section 2A;

The definition of the word "employer" brings into sharp focus the expression "contract of service" and that expression is also defined in s. 2(1) of the Employment Act 1955 (Act 265) as follows:

'contract of service' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

In the context of the present case, encl. 5 did not disclose whether there was a contract of service entered between Kim Eng's father and the previous owner of the land and, if there was one, which was not the case here, what were the terms stipulated therein. Kim Eng's father too did not depose a single affidavit in opposition and this court cannot conjecture in his favour.

This was a trial by way of affidavit evidence and I am confined to the affidavits filed herein and nothing else. Section 10 of the Employment Act 1955 (Act 265) enacts as follows:

(1) A contract of service for a specified period of time exceeding one month or for the performance of a specified piece of work, where the time reasonably required for the completion of the work exceeds or may exceed one month, shall be in writing.

(2) In every written contract of service a clause shall be included setting out the manner in which such contract may be terminated by either party in accordance with this Part.

and this meant that the contract of service between Kim Eng's father and the previous owner of the land shall be in writing. That being the case, in the absence of that contract of service this court cannot presume that there was an employer and employee relationship between Kim Eng's father and the previous owner of the land.

The importance of exhibiting the contract of service in encl. 5 can never be doubted. Under the contract of service an employer has the power to direct and control the work of the employee. It is germane to consider that "the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done" (*Mersey Docks and Harbour Board v. Coggins and Griffith*

*(Liverpool) Ltd* [1947] AC 1, 17; and *Performing Right Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762, 93 LJ KB 306). If the employer exercises maximum control over the employee in regard to the details of the work to be done, the greater would be the inference that the relationship is one of a contract of service or what is usually termed as a contract of employment (*Simmons v. Heath Laundry* [1910] 1 KB 543, 550; and *Whittaker v. Minister of Pensions and National Insurance* [1967] 1 QB 156). A caveat must be lodged here and it is this: the question of control is one of the factors to be considered and from the long line of authorities it is far from conclusive. For instance, in *Ready – Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497, the court there ruled that the control exercised by the employer was not sufficient to identify the contract as a contract of employment. Then there is the case of *Hitchcock v. Post Office* [1980] ICR 100 where the court held that a sub-postmaster was not an employee of the post office despite the control exercised on the sub-postmaster. A skilled employee will not be subject to actual control by the employer in regard to the details of his work (*Simmons v. Heath Laundry* [1910] 1 KB 543, 553; and *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd (supra)*), but all the same he is still an employee if he is being paid by the employer and he can also be dismissed by the employer *(Morren v. S. Winton and Pendlebury Borough Council* [1965] 1 WLR 576). Sad to say, all these propositions of law can never be invoked nor vigorously applied in the absence of the contract of service.

Mr. K. Sila Dass argued that Mr. Ang Boon Heng conceded that there was an employer employee relationship between Kim Eng's father and the previous owner of the land and using this as a leverage it was argued that that kind of relationship would take the present case outside the purview of O. 89 r. 1 of the RHC. The answer to this problem is rather simple. Order 89 r. 1 of the RHC does not provide for an employer employee situation and is entirely outside its scope. To put it in another way, no where does it say that proceedings should not be commenced under this order for the recovery of property occupied by an employee under a contract of service with the employer. It merely says that the rule will not apply to a tenant or to a tenant holding over after the termination of the tenancy. Order 89 procedure applies to situations where persons entered into occupation of land without the licence or consent of the person entitled to possession or any predecessor in title of his and it also extends to situations where persons enter into occupation of land with a licence from the person entitled to possession or any predecessor in title of his but subsequently remains in occupation without the licence or consent of the person entitled to possession of the land or any predecessor in title of his. In my judgment, the plaintiffs' application in encl. 3 grounded on O. 89 r. 1 of the RHC was the right procedure to adopt.

It was argued that the defendants had equitable interests over the land and that this court ought to protect the defendants accordingly. For the plaintiffs, an opposite argument was advanced. Our land laws are governed by the National Land Code 1965 ("NLC") and under our law equity has no role to play at all (*Punca Klasik Sdn Bhd (No: 2)* [1995] 4 BLJ 337, [1996] 5 MLJ 92). At any rate, in order for equity to intervene, the defendants must show evidence of some inducement or encouragement by the plaintiffs or some expectation held out by them to the defendants and on the strength of which the defendants had expended money on the land. On the facts, there was nothing to support the application of any equitable doctrine in favour of the defendants. Equitable estoppel as set out in *Khew Ah Bah v. Hong Ah Mye* [1971] 2 MLJ 86; *Ooi Ho Cheng v. Grace Joseph & Ors* [1975] 1 MLJ 168; *Lim Hock Kim v. Sim Seng Quee* [1982] 2 MLJ 210; and *Ooi Ah Seng v. Chan Lin Lam* [1973] 2 MLJ 20 too cannot be invoked in the present case because there was no landlord tenant relationship between the plaintiffs and the defendants. Nor can I infer from the available evidence that there was either consent or a licence to occupy the land. The employer employee relationship adumbrated above cannot give rise to an inference that there was either consent or a licence to occupy the land. A contract of service must contain a clause for termination and once termination sets in, there is nothing for the employee to hold onto. Section 11 of the Employment Act 1955 enacts as follows:

> (1) A contract of service for a specified period of time or for the performance of a specified piece of work shall, unless otherwise terminated in accordance with this Part, terminate when the period of time for which such contract was made has expired or when the piece of work specified in such contract has been completed.
>
> (2) A contract of service for an unspecified period of time shall continue in force until terminated in accordance with this Part.

and termination will naturally follow the contract of service.

It was stressed that the defendants had been on the land for 40 long lingering years. But the water bills that were issued in 1974 betrayed the stand of the defendants. In my judgment, payments of electricity and water bills do not give any right to the defendants to own the land *(Punca Klasik Sdn Bhd (No: 2) (supra))*. The land is now owned by the plaintiffs and under the law the house too becomes part and parcel of the land and the ownership thereof rests entirely with the plaintiffs *(Punca Klasik Sdn Bhd (No: 2) (supra))*.

On the facts of the case, the only label that can be attached to the defendants would be the unenviable label of being mere squatters simpliciter. The defendants' position are no better than *Shaheen bt Abu Bakar* and *Ho Choong Yee of Shaheen's* case *(supra)*. Being squatters, the defendants must give way to the plaintiffs under O. 89 r. 1 of the RHC.

In regard to the notice to quit, Mr. K. Sila Dass relied on *McPhail's* case to drive home the message that the notice to quit plays a very important role in cases of this nature. This is indeed true and the plaintiffs have fulfilled this part of their bounden duty. In encl. 2, at para. 7 there was reference to a notice to quit and that notice to quit was exhibited and marked as exh. "EEH 3" and had been reproduced in the early part of this judgment. If there was doubt that there was ever a notice to quit, then the exhibit marked as "EEH 3" of encl. 2 would put an end to that doubt once and for all.

For these varied reasons, I granted the prayers sought for in encl. 3 especially prayers (1) (2) and (3) thereof.

***Stay Of Execution***

By encl. 9, the defendants applied for a stay of execution pending disposal of the appeal in the Court of Appeal to its finality and that the costs of the application be costs in the cause. Kim Eng affirmed an affidavit in support on 18 January 1999 as seen in encl. 8 supporting fully encl. 9. Kim Eng deposed that he had filed a notice of motion at the Court of Appeal for leave to appeal and he enclosed therein a copy of that notice of motion. He further deposed that until the final disposal of the appeal, it was imperative that the wooden single storey bungalow house erected on the land should not be demolished and it should be maintained in its present manner so as to give effect to the decision of the Court of Appeal the event the appeal is allowed. He was advised and he verily believed that it was necessary that the execution proceedings be stayed in order to maintain the *status quo* of the parties pending disposal of the appeal to the Court of Appeal so as not to render the appeal, if successful, nugatory. He was again advised and he verily believed that the plaintiffs would not be prejudiced as any prejudice, if suffered, can easily be compensated by costs. He too was advised and he verily believed that he had good grounds to appeal and had good chances of success. For these reasons, he prayed for an order in terms of encl. 9.

Now, reading encl. 8 it can easily be discerned that no notice of appeal had been filed in the Court of Appeal. The defendants had only filed a notice of motion at the Court of Appeal for leave to appeal. Section 73 of the Courts of Judicature Act 1964 enacts that:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Rule 5(1) of the Rules of the Court of Appeal 1994 states that appeals to the court shall be by way of re-hearing and shall be brought by giving notice of appeal. The basic principle of law would be this: even if there is an appeal in regard to my decision, which was not the case here, that by itself cannot constitute special circumstances (*Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 AMR 39, 231; [1995] 3 MLJ 224). The other trite and basic principle of law distilled from the case of *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 3 MLJ 40 is this: that merits or strong grounds for an appeal cannot constitute special circumstances. In other words, whatever grounds being advanced to challenge the validity or correctness of the judgment or order appealed from cannot be said to be special circumstances.

In *Salim bin Ismail & Ors v. Lebbey Sdn Bhd (No: 1)* [1997] 1 CLJ 98; [1997] 2 MLJ 1, Mahadev Shankar JCA writing for the Court of Appeal granted a stay of execution for the following reasons (see p. 3 of the report):

> It is to be noted that the orders in the court below were not made after full trial, but on a summary application by Lebbey on affidavit evidence. The grounds of judgment of the trial judge are not before us and it would be premature for us to say that this appeal is without any prospect of success.
>
> In deciding whether to grant a stay, we have to balance the financial repercussions which will be suffered by Lebbey with the imminent destruction of the homes of the applicants if the orders appealed against are enforced.
>
> The subject-matter of this appeal from the applicants' point of view is their continued right to stay in their homes until their claims have been finally disposed of in a full trial. The destruction of that right cannot be adequately compensated with money. This is a special reason why a stay should be granted. Lebbey's counsel requested that the court only grant a conditional stay and require the applicants to deposit RM1m if a stay is to be granted. We did not think that such a request was realistic.
>
> We therefore granted a stay, but directed that the appeal record be filed within seven days from the date of our order. We also directed that there should be an early hearing of the appeal, and the costs of this application abide the result of the appeal.

but the facts there were entirely different from the present case. There, the applicants were long standing occupants of state land and they were permitted to occupy the land by the State Authority without objection. Here, the land had been purchased by the plaintiffs and the land was not state land. There, the State Authority did not take any direct action to terminate the applicants' occupation of state land. Here, the plaintiffs issued a notice to quit to the

defendants. In short, factually speaking the case of *Salim bin Ismail & Ors v. Lebbey Sdn Bhd (No: 1) (supra)* can easily be distinguished and once distinguished it cannot be used as a leverage in favour of the defendants.

In *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, the Court of Appeal applied the nugatory approach and refused the stay as the pending appeal was obviously unarguable. The Court of Appeal was of the view that it was not a proper exercise of discretion to grant a stay as the substantive appeal lacked merit and was doomed to fail. Of course, the Court of Appeal in that case was dealing with a winding petition where it "ought to be prosecuted to a conclusion with all due speed". Likewise here, although this was not a winding up petition, the substantive appeal had no merit and doomed to fail in limine.

In my judgment, no special circumstances existed in the present case to warrant a stay. The relationship between Kim Eng's father and the previous owner of the land was not on the basis of landlord and tenant but rather on the basis of employer employee and, consequently, O. 89 r. 1 of the RHC was the right procedure to adopt to oust the defendants from the land. The defendants were mere squatters simpliciter. In exercising my discretion to refuse stay, I took into account the following factors:

(1) the fact that the appeal may be successful in the Court of Appeal cannot constitute special circumstance nor can the nugatory approach be adopted in favour of the defendants;

(2) successful litigants, like the plaintiffs, are entitled to enjoy the fruits of their success;

(3) effect must be given to O. 89 of the RHC, a procedure formulated by the Rules Committee to provide expeditious despatch of business in the courts;

(4) if the stay was granted for the reasons advanced by the defendants, then the purpose of the Rules Committee in formulating O. 89 of the RHC would be defeated because the same arguments would virtually be used to apply for a stay involving an O. 89 application.

For these reasons, I dismissed encl. 9 with costs.